SINGAPORE REPORTS

SIVAKOLUNTHU KUMARASAMY v. SHANMUGAM NAGAIAH & ANOR.

[C.A. (Lai Kew Chai, Thean J.J. & Chan Sek Keong J.C.) December 15, 1987]

[Singapore – Civil Appeal No. 102 of 1985]

Family Law – Divorce – Matrimonial property – Court order made as to division of property – Property held in joint tenancy – One of the parties dies – Whether order valid – Whether order severes joint tenancy – Whether order could be varied subsequently – Principles applicable – Women's Charter (Cap. 353, 1985 Ed.), ss. 106(1) & 137(1).

Land Law – Joint tenancy – Matrimonial property – Whether court order dividing property severes joint tenancy – Death of one party before implementation of order – Whether rule of survivorship operates – Principles applicable.

The appellant and one K.T. Arasu were married on January 25, 1953. On March 22, 1982, the appellant filed a petition for divorce. On June 30, 1982, the court granted a decree nisi to the appellant.

The appellant and her husband owned a property in which they were joint tenants. They, however, did not live in the house and it was rented out. After the decree nisi was granted, the appellant sought a division of the said property. On October 5, 1983 the learned judge of the High Court made an order (hereinafter called a settlement order) for the sale of the said property and for the division of the proceeds of the sale between the parties equally. Before this order could be implemented, K.T. Arasu passed away on October 15, 1983.

On November 29, 1984, the administrators of K.T. Arasu brought an action claiming, *inter alia*, the implementation of the settlement order. The appellant resisted the action and sought a variation of the order. The learned judge of the High Court gave judgment for the administrators (see [1986] 2 M.L.J. 181). The appellant appealed to the Court of Appeal.

Held, dismissing the appeal: (1) it is not the law in Singapore that a unilateral declaration of intention to severe a joint tenancy, when communicated to the other joint tenant, has the effect of severing it into a tenancy in common. That is the law in England by reason of section 36(2) of the Law of Property Act 1925. This Act has no application to Singapore. The law in Singapore in this respect is the law prevailing in England before 1925;

(2) for historical and policy considerations, the expression "decree of divorce" in section 106(1) of the Women's Charter must be construed to include a decree nisi. Therefore, the settlement order was valid when made;

(3) when the learned judge made the order, it was intended to be a "once and for all" order for the division of matrimonial assets as the marriage had irretrievably broken down;

(4) the settlement order is an order made under Part IX of the Women's Charter and is therefore enforceable like any other court order. Such order continues to be enforceable after the death of a party to the divorce suit except where the order, by its very nature, ceases to be enforceable after death;

(5) the settlement order severed the joint tenancy when the order was made and the court, by making the settlement order in the form it did, intended to divide the said property between the parties without any limitation as to the length of life of either of them. There is no reason why the court order should not have the effect of severance. All orders of court made in exercise of its powers to make partition orders have such effect even where the order has not been carried into effect before the death of a party to the proceedings;

(6) the learned judge's decision not to vary the terms of the order was correct. He had no power to vary the settlement order as there is no provision in the Women's Charter which empowers a court to vary such order. When made, it takes effect like any other court order and may only be varied on appeal. There was no appeal against the settlement order;

(7) the learned judge had not exercised his discretion wrongly in refusing to vary the terms of the settlement order.

Cases referred to:

(1) *Williams* v. *Hensman* 70 E.R. 862.
(2) *Khoo Seoke Haing* v. *Cheah Khay Pin* (1885) 4 Ky. 74.
(3) *Hawksley* v. *May & Ors.* [1955] 3 All E.R. 353.
(4) *Re Draper's Conveyance* [1967] 3 All E.R. 853.
(5) *Nielson-Jones* v. *Fedden & Ors.* [1974] 3 All E.R. 38.
(6) *Burgess* v. *Rawnsley* [1975] 3 All E.R. 142.
(7) *Tan Chew Hoe Neo* v. *Chee Swee Cheng* (1928) L.R. 56 I.A. 112; A.I.R. 1929 P.C. 72; 2 B.L.S.S. 504.
(8) *Jack Chia-MPH Ltd.* v. *Malayan Credit Ltd.* [1986] 1 M.L.J. 366.
(9) *Harris & Anor.* v. *Goddard & Ors.* [1983] 1 W.L.R. 1203.
(10) *Gilbert* v. *Gilbert & Boucher* [1928] P. 1.
(11) *Clarke* v. *Clarke & Lindsay* [1911] P. 186.
(12) *Fender* v. *St. John-Mildmay* [1936] 1 K.B. 111.
(13) *Fender* v. *St. John-Mildmay* [1938] A.C. 1.
(14) *Purse* v. *Purse* [1981] P. 143.
(15) *Barder* v. *Barder* [1987] 2 W.L.R. 1350.
(16) *Sugden* v. *Sugden* [1957] P. 120.
(17) *Public Trustee* v. *Grivas* [1974] 2 N.S.W.L.R. 317.

COURT OF APPEAL.

Cheong Yuen Hee (*Jacob Chacko* with him) for the appellant.

James Bahadur Masih for the respondent.

Cur. Adv. Vult.

Chan Sek Keong J.C. (delivering the judgment of the court): This appeal has come before us in the following circumstances.

The defendant (who is the appellant in this appeal) and K.T. Arasu (whose personal repre-

sentatives are the respondents here) were married on January 25, 1953. The marriage eventually turned out to be an unhappy one. On March 22, 1982, the defendant filed a petition for divorce in divorce petition No. 334 of 1982 on the ground that the parties had lived apart since December 1976. At that time, the couple had four children, aged 27, 26, 23 and 21. They owned a property known as Nos. 41/41A Jalan Tari Serimpi, Singapore (hereinafter called "the said property") which they had purchased in 1971 and had it registered in their names as joint tenants. On June 30, 1982, the court granted a decree nisi to the defendant.

After the decree nisi was granted, the defendant sought a division of the said property. The affidavits filed by each party in support of their respective contentions disclosed disputed facts among which were the proportion of the purchase consideration contributed by each and the purpose of the parties in buying the said property. The defendant had never, owing to domestic conflicts, agreed to nor did she ever live in the said property which had been, in consequence, let out from time to time. She did not regard it as the matrimonial home.

After considering the affidavit evidence and hearing counsel for the parties, Chua J. on October 5, 1983 made an order (hereinafter called "the settlement order") for the sale of the said property and for the division of the proceeds of sale between the parties equally. Before this order could be implemented, K.T. Arasu died on October 15, 1983 following upon an act of self-immolation three days before. This was a tragic end to an unhappy marriage.

Prior to this date, K.T. Arasu had made a will under which he bequeathed all his property, real and personal, whatsoever and wheresoever situate to the Ramakrishna Mission Boys' Home. After his death, the respondents took out a grant of letter of administration to his estate with the will annexed. They were desirous of getting in that portion of the proceeds of sale ordered to be distributed to the estate under the settlement order. However, this could not be done because the defendant, as the widow, claimed that the settlement order had no effect or ceased to have effect on the death of her husband, and that in consequence she was entitled to the whole of the said property or the proceeds of sale by operation of the rule of survivorship.

On November 29, 1984, the administrators commenced an action by way of originating summons for the following reliefs:

(a) a declaration that the joint tenancy of K.T. Arasu and the defendant in the said property had been severed by the settlement order;

(b) an order that the said property be sold within six months and the proceeds divided equally between the plaintiffs and the defendant;

(c) an order that the defendant pay to the plaintiffs one half the rental proceeds received from the said property since June 1, 1984.

The defendant resisted the action and at the same time sought a variation of the settlement order that she be granted 75% of the proceeds of sale on the ground that K.T. Arasu had earlier deceived the court into granting an equal division by failing to disclose that he had, at the relevant time, a cash deposit of $100,000 in a bank account.

Chua J., after considering the affidavit evidence and hearing full submissions, gave judgment in favour of the plaintiffs. His Lordship also dismissed the defendant's claim for a variation of the settlement order on the ground that (a) the court did not have the power to do so and (b) even if it did, he would not do so as the non-disclosure of the $100,000 cash deposit would not have affected his mind in making the settlement order.

The defendant has now appealed against the decision of Chua J. The issues in this appeal, as we see them, are as follows:

(1) whether the settlement order had effect when made, and if so, whether it ceased to have effect when K.T. Arasu died before the decree nisi had been made absolute;

(2) whether, if the settlement order took effect when it was made, it severed the joint tenancy in the said property when made or when K.T. Arasu died;

(3) whether the court has the power to vary the settlement order after the death of K.T. Arasu.

The following authorities were referred to by Chua J. in his written grounds of decision: *Williams* v. *Hensman*[1] (where it was held that the conduct of the parties had severed the joint tenancy); *Khoo Seoke Haing* v. *Cheah Khay Pin*[2] (where it

was held that a partition order, although not carried out when one party died, severed a joint tenancy); *Hawksley* v. *May And Others*[3] (where it was held that an unilateral declaration of the intention to sever was sufficient to sever a joint tenancy under section 36(2) of the Law of Property Act 1925); *Re Draper's Conveyance*[4] (where it was held that the application made and affidavit filed in support thereof under section 17 of the Married Women's Property Act 1882 (which is *in pari materia* with section 55 of the Women's Charter) together constituted a notice sufficient to effect a severance of a joint tenancy by virtue of section 36(2) of the Law of Property Act 1925); *Nielson-Jones and Others* v. *Fedden*[5] (where it was held that an unilateral declaration to sever a joint tenancy was ineffective); *Burgess* v. *Rawnsley*[6] (where it was held that an oral agreement to purchase the other joint tenant's share was sufficient to effect a severance of the joint tenancy even though the agreement, being oral, was not enforceable by virtue of section 40 of the Law of Property Act 1925).

The law in England prior to 1925 as to severance of a joint tenancy by act of the parties is set out in the judgment of Page Wood V.C. in *Williams* v. *Hensman*[1] as follows:

"A joint tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share ... Secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected, as happened in the cases of *Wilson* v. *Bell* and *Jackson* v. *Jackson*."

After examining these cases, Chua J. stated the law as follows:

"I am of the view that a unilateral declaration of intention to sever, if communicated to the other joint tenant, is sufficient to effect a severance. I am also of the view that an order of court directing the sale and division of the proceeds of sale in accordance with the parties' respective interests in the joint tenancy operates as a severance of the joint tenancy the moment it is made."

Counsel for the defendant contended that both the statements of law enunciated by Chua J. were wrong.

In regard to the first statement, we agree with counsel's submission. In our view, it is not the law in Singapore that a unilateral declaration of intention to sever a joint tenancy, when communicated to the other joint tenant, has the effect of severing it into a tenancy in common. That is the law in England by reason of section 36(2) of the Law of Property Act of 1925. This Act has no application to Singapore. The law in Singapore in this respect was the law prevailing in England before 1925: see *Tan Chew Hoe Neo* v. *Chee Swee Cheng*[7] where the Privy Council applied the principles laid down in *Williams* v. *Hensman*[1] in an appeal from the Straits Settlements; and *Jack Chia-MPH Ltd.* v. *Malayan Credit Ltd.*[8] at p. 367.

It is true that Lord Denning M.R. in *Burgess* v. *Rawnsley*[6] expressed the view that in England even before the introduction of section 36(2) of the 1925 Act, a notice in writing of one's desire to sever was effective. He said, at p. 147:

"... I look on section 36(2) of the 1925 Act as declaratory of the law as to severance by notice and not as a new provision confined to real estate. A joint tenancy in personal estate can be severed by notice just as a joint tenancy in real estate."

However, the other members of the court, Browne L.J. and Sir John Pennycuick, both expressed contrary views. Sir John Pennycuick said, at p. 154:

"(2) Section 36(2) of the Law of Property Act 1925 has radically altered the law in respect of severance by introducing an entirely new method of severance as regards land, namely notice in writing given by one joint tenant to the other."

Browne L.J. concurred with this statement of law. Subsequently, another panel of the Court of Appeal in *Harris And Another* v. *Goddard And Others*[9] expressed the same view. Lawton L.J., with whom Kerr and Dillon L.JJ. agreed, said at pp. 1208 and 1209:

"... The words in section 36(2) 'do such other acts or things as would ... have been effectual to sever the tenancy' put into statutory language the other ways of effecting severance to which Page-Wood V.C. referred in *Williams* v. *Hensman*. The words 'and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire' operate to extend the mutual agreement concept of severance referred to in *Williams* v. *Hensman*. Unilateral action to sever a joint tenancy is now possible. Before 1925, severance by unilateral action was only possible when one joint tenant disposed of his interest to a third party. When a notice in writing of a desire to sever is served pursuant to section 36(2) it takes effect forthwith. It follows that a desire to sever must evince an intention to bring about the wanted result immediately."

In regard to the second statement, counsel's argument was that under section 106(1) of the Women's Charter, the court in the exercise of its divorce jurisdiction has no power to make an ancillary order regarding the division of matrimonial assets until a decree of divorce has been made absolute. Section 106(1) reads as follows:

"The court shall have power, when granting a decree of divorce, judicial separation or nullity of marriage, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale."

Counsel contended that a decree of divorce, in its original form, was a final decree and that it was only by the Matrimonial Causes Act 1860 in England that the concept of a two-stage decree, *i.e.* a decree nisi followed by a decree absolute after a period of time, was introduced. Counsel's argument was that this change had not affected the meaning of the expression "decree of divorce" when used in divorce legislation in general (including the Women's Charter). Counsel was mindful of the established practice of the courts in Singapore of making ancillary orders after the decrees nisi were granted and before they became absolute, but he argued that such practice was not justified in law except on the basis that such ancillary orders were conditional in character, *i.e.* they would not take effect until and unless the decrees nisi have been made absolute.

Counsel referred to the decision of the Court of Appeal in *Gilbert* v. *Gilbert & Boucher*[10] in support of his contentions. In that case, the Court of Appeal held that the expression "decree of divorce" in section 192 of the Judicature (Consolidation) Act 1925 meant a final decree of divorce. That section read:

"The court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of antenuptial or post nuptial settlements ..."

However, the judgments delivered in that case clearly show that their Lordships' decision was based on the ground that the said Act, which reproduced section 5 of the Matrimonial Causes Act 1859 except for the omission of the word "final" before the word "decree", was a consolidation Act and was not intended to alter the law as laid down in *Clarke* v. *Clarke & Lindsay*.[11] In the latter case, another Court of Appeal had earlier decided that a court had no jurisdiction under section 5 of the Act of 1859 to vary any marriage settlement until the decree of dissolution had been made absolute. So understood, the decision in *Gilbert* v. *Gilbert & Boucher*[10] is of no assistance to us in construing the meaning of the same expression in section 106(1) of the Women's Charter.

In our view, the historical development of the decree of divorce does not support counsel's contention. In *Fender* v. *St. John-Mildmay*[12] at pp. 115-117, Greer L.J. explained its development thus:

"Until the passing of the Matrimonial Causes Act of 1857 no court had any power to decree a divorce between two married persons for any cause whatever ..... By the Act of 1857 the Divorce Court was created: and the court was empowered, if certain facts were proved with regard to the conduct of a husband or a wife, to grant a divorce; thus converting two married people into unmarried people. Until the passing of the Matrimonial Causes Act of 1860 divorce was brought about immediately after the trial and operated without any period of suspension, such as the three months provided for in the Act of 1860, extended to six months by a later Act. The reason for this provision has nothing whatever to do with the consideration that it was desirable to give the parties a period of time in which they might reconsider their relations and become reconciled and resume cohabitation.

These words [*i.e.* in section 7 of the Act of 1860 providing for the grant of the decree nisi] seem to me clearly to indicate that it was not contemplated that there should be any change in the form of the decree except that it should be a decree nisi which should not be made absolute until the statutory time elapsed, because it was necessary in the public interest to give an opportunity to the Queen's Proctor or other persons to show cause why, notwithstanding the decision of the judge at the hearing of the petition, the decree should not be made absolute; and if the judge on considering the matter decided that it ought not to be made absolute, the decree nisi should be reversed. Neither the Act of 1860 nor the Act of 1866 required any application to be made by the petitioner to make the decree nisi absolute ...

It seems to me that a decree nisi adjudging that the spouses should be divorced unless sufficient cause should be shown, *etc.*, makes a vital change in the relation of the two spouses to one another. It relieves the petitioner from all his or her duties arising out of the marriage; and as a necessary consequence, relieves the other party to the decree from the matrimonial obligations which were undertaken in consideration of those undertaken by the petitioner. Of course, if the rare event happened of the parties becoming reconciled before the decree nisi was made absolute, the petitioner would be entitled to ask the court, in place of making the decree absolute, to reverse or discharge it altogether: but it seems to me that as long as the decree nisi is in force, it relieves both parties from the obligations that married persons owe to one another. A decree nisi puts an end to the whole content of the marriage contract, leaving only the shell, that is, the technical bond. I may add that it is common knowledge that in the vast majority of cases decrees nisi are in due course made absolute."

In *Fender* v. *St. John-Mildmay*,[12] the Court of Appeal by a majority, with Greer L.J. dissenting, held that a promise made by one spouse, after a decree nisi for the dissolution of the marriage had been pronounced, to marry a third person after the decree had been made absolute, was void as being against public policy. On appeal, the decision was reversed by the House of Lords[13] (also by a majority). At pp. 45-46, Lord Wright (who agreed with Greer L.J.) had this to say:

"But in the vast majority of cases, the decree absolute follows the decree nisi in due course; indeed the court has a discretion to make the decree absolute at any time within the stipulated six months.

The marriage then in the sense and respects which I have indicated continues until decree absolute. But it is obvious that in truth and in substance there is no longer any marriage. There is no longer any matrimonial home, no consortium vitae, no right on either side to conjugal rights. The court has at the suit of the petitioner publicly found the respondent guilty of matrimonial offences which in law go to the root of the relation, there is no common home for the children, if there are children, and the court has to provide for their position. The court has pronounced for dissolution to take place, subject to the qualification I have stated, at the end of a specific fixed and brief period. If realities are to be looked at and not mere form, by the court, as the court did in regard to judicial separation, the marriage is at an end, and the parties are entitled to provide for their future, at the end of the period fixed for the decree absolute, when by English law they are entitled to marry again."

We have quoted the observations of Greer L.J. and Lord Wright *in extenso* to show that the courts in England have always regarded the pronouncement of a decree nisi as having the effect of putting an end to the marriage. A decree nisi was for all practical purposes a decree absolute except for the purpose of enabling the Queen's Proctor or other persons to show cause why the decree nisi should not be made absolute.

In spite of the passage of a hundred years, the basic structure of the divorce jurisdiction set out in the Acts of 1860 and 1866 has not changed. It has been incorporated in the Women's Charter. Only the grounds for divorce have changed. Under the present law, the sole ground for divorce is the irretrievable breakdown of the marriage. The grant of a decree nisi is a recognition by the court that the marriage is at an end. When such a decree is pronounced, there is, as Lord Wright said, no longer any matrimonial home, no *consortium vitae* and no right on either side to conjugal rights. It would therefore be in the interest of the parties and they would want the divorce court to settle their domestic affairs irrevocably, particularly the settlement or division of their matrimonial assets. There is therefore good reason to construe section 106(1) so as to empower the court to make such orders after the decree nisi has been pronounced.

That the jurisdiction to make ancillary orders is founded on the reality of the break-up of a marriage rather than the legal formality of such a break-up is also evidenced by the power of the court to order a division of matrimonial assets upon the granting of a decree of judicial separation. The granting of a decree of judicial separation is in itself a recognition that the marriage has broken down. But judicial separation is not divorce nor is it as serious as a decree nisi as a step in severing the matrimonial bond. Notwithstanding this, the court is given the power to order a division of matrimonial assets in such a situation. The conclusion is *a fortiori* where a decree nisi has been granted.

It may, of course, be argued that it is illogical for a court to make an order for the division of matrimonial assets binding on the parties where the marriage has not been finally dissolved by the law. In our view, there are three countervailing arguments against this point in this case. Firstly, if the decree nisi is not made absolute, not by reason of death of a party but by the reconciliation of the parties, then the parties may take the necessary steps to either reverse or neutralize the effect of any such order. Secondly, even if the parties do not take any steps to reverse or neutralize the effect of such an order, the character of the property concerned has not changed. It remains matrimonial property, although perhaps as a result of the order, it may be held in different proportions or in a different form. Thirdly, a judicial separation does not involve the dissolution of a marriage and yet, in that situation, the court has the power to order the division of matrimonial assets.

In our view therefore, both for historical and policy considerations the expression "decree of divorce" in section 106(1) of the Women's Charter must be construed to include a decree nisi. We therefore hold that the settlement order was valid when made.

The second argument advanced by counsel for the appellant is that the divorce proceedings abated upon the death of K.T. Arasu for all purposes. Counsel referred to *Rayden on Divorce* 14th Ed. p. 563, and 13 *Halsbury's Laws of England* 4th Ed. paras 891-892. Following from this, it was

submitted, the settlement order, being an order for the division of matrimonial assets made consequent upon divorce proceedings, also ceased to have effect. We do not agree with this submission. In *Purse* v. *Purse*[14], the Court of Appeal, after examining all the authorities, held that although no further steps could be taken in proceedings pending before the court to obtain a decree nisi or absolute where a spouse died before such a decree had been granted, the divorce suit did not automatically abate where there was still a *res* before the court. In that case, the wife commenced proceedings after the death of the husband to set aside the order dispensing with service and the resultant decrees nisi and absolute on the ground that she had not been given an opportunity to defend the divorce petition. The Court of Appeal allowed her appeal.

In *Barder* v. *Barder*[15] the wife in proceedings for divorce was awarded care and control of the two children of the marriage and a consent order was made providing for the transfer by the husband of the matrimonial home to her. Shortly after the order was made, the wife killed the two children and committed suicide. The husband then applied for leave to appeal against the order out of time and the wife's mother, the personal representative of the estate of the wife, applied for and was given leave to intervene. One of the questions for decision was whether the death of the wife had abated the proceedings so that the court had no jurisdiction to entertain the husband's application. It was held that consent order had been made on the fundamental assumption that the wife and children would stay at the matrimonial home for an indefinite time and that assumption had been invalidated by death and the court had jurisdiction to grant leave to appeal out of time.

Lord Brandon, with whom the other Law Lords agreed, stated the law in these terms (at pp. 1360-61):

"I would state the conclusions to which I think that these authorities lead in this way. First, there is no general rule that, where one of the parties to a divorce suit has died, the suit abates, so that no further proceedings can be taken in it. The passage in the judgment of Shearman J. in *Maconochie* v. *Maconochie* [1916] P. 326, 328, in which he stated that such a general rule existed, cannot be supported. Secondly, it is unhelpful, in cases of the kind under discussion, to refer to abatement at all. The real question in such cases is whether, where one of the parties to a divorce suit has died, further proceedings in the suit can or cannot be taken. Thirdly, the answer to that question, when it arises, depends in all cases on two matters and in some cases also on a third. The first matter is the nature of the further proceedings sought to be taken. The second matter is the true construction of the relevant statutory provision or provisions, or of a particular order made under them, or both. The third matter is the applicability of section 1(1) of the Act of 1934."

Applying these guidelines, the question we have to consider is therefore not whether the divorce proceedings had abated but whether the court has jurisdiction to enforce the settlement order. This question is to be answered by reference to the three matters referred to in that part of Lord Brandon's speech which we have quoted.

As to the first matter, the nature of these proceedings is substantially a claim to enforce the settlement order which at the death of K.T. Arasu had not been carried out. There is still a *res* before the court. The performance of the settlement order is not dependent upon K.T. Arasu being alive, unlike an order for maintenance or custody. Except for the argument that the court had no power to make the settlement order until after the decree has become absolute, an argument which we have rejected, no reason was advanced before us why the said order should not be carried into effect. In our view, when Chua J. made the order, he intended it to be a "once and for all" order for the division of matrimonial assets as the marriage had irretrievably broken down.

As to the second matter, section 137(1) of the Women's Charter provides as follows:

"All decrees and orders made by the court in proceedings under this Part shall be enforced, and may be appealed from, as if they were decrees or orders made by the court in the exercise of its original civil jurisdiction."

The meaning of section 137(1) is plain. For the purposes of enforcement or appeal, any decree or order made by a court in exercise of its divorce jurisdiction is treated as if made in the exercise of its original civil jurisdiction. The settlement order is an order made under Part IX and is therefore enforceable like any other court order. Such order continues to be enforceable after the death of a party to the divorce suit except where the order, by its very nature, ceases to be enforceable after death, *e.g.* an order for maintenance or custody.

As to the third matter, Lord Denning in *Sugden* v. *Sugden*[16] said at p. 134 in relation to section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934:

"... The section only applies to 'causes of action' which subsist against the deceased at the time of his death ... 'Causes of action' in the section means, I think, rights which can be enforced – or liabilities which can be redressed – by legal proceedings in the Queen's courts. These now survive against the estate of the deceased person. 'Causes of action' are not, however, confined to rights enforceable by action, strictly so called – that is, by action at law or in equity. They extend also to rights enforceable by proceedings in the Divorce Court, provided that they really are rights and not mere hopes or contingencies. They include, for instance, a sum payable for costs under an order of the Divorce Court, or a right to a secured provision under an order already made against a man before his death: see *Hyde* v. *Hyde* [1948] P. 196 and *Mosey* v. *Mosey and Barker* [1956] P. 26."

The corresponding provision under Singapore law is section 7 of the Civil Law Act. However, in view of the effect of section 137(1) of the Women's Charter, it is unnecessary for us to decide whether the settlement order also gives rise to a cause of action which survives the death of K.T. Arasu under section 7 of the Civil Law Act. If it were necessary for us to do so, we would be inclined to hold that the settlement order created a right of action which survives the death of K.T. Arasu. We see no distinction in substance, between an order for a secured provision under a maintenance order and an order for a distribution of matrimonial property in divorce proceedings.

Leaving aside the question whether the settlement order is enforceable by virtue of section 137(1) of the Women's Charter or as a cause of action which survives under section 7 of the Civil Law Act, there is still the question whether the settlement order, when made, had the effect of severing the joint tenancy in the said property. We are of the opinion that it did. The court by making the settlement order in the form it did (*i.e.* by ordering a sale of the said property and the distribution of the proceeds of sale equally between the parties) intended to divide the said property between the parties without any limitation as to the length of life of either of them.

The severance was not effected by an act of the parties but by an order of court. In principle, there is no reason why a court order may not have such an effect. All orders of court made in exercise of its powers to make partition orders have such effect even where the order has not been carried into effect before the death of a party to the proceedings: see *Khoo Seoke Haing.*[2]

We find support for this principle in *Public Trustee* v. *Grivas*[17]. In that case, the parties, by consent, obtained an order under section 86(1) of the Matrimonial Causes Act 1959-1966 that the former matrimonial home, which they had owned as joint tenants, be sold and the net proceeds of sale be equally divided between them. The decree nisi so ordered. After the decree had become absolute, the husband remarried, but before the property had been sold, he died intestate. The Public Trustee, as administrator of his estate, sought an order that he, the Public Trustee, and the former wife held the property as tenants in common. Bowen C.J. held that the joint tenancy was severed on one of two grounds, *i.e.* firstly, the order of court had the effect of severing the joint tenancy and, secondly, the form of the order which was by consent and the pleadings evidenced an agreement between the parties that there should be a final division of the matrimonial home which had the effect of bringing about a severance. In respect of the first ground, Bowen C.J. said:

"Further, it appears to me that under section 86(1) of the Matrimonial Causes Act the court has jurisdiction to make a settlement, which is a once for all order, so that even if there remain matters to be attended to, which flow from obligations placed by the order upon one or other of the parties and which are incomplete at the time the party subject to the obligation dies, the order will not be aborted, but will have to be carried out by the legal personal representatives of the party, unless there is rescission or a variation of the order procured from the court in a proper manner. The order, in my view, being an indivisible provision for a settlement between the parties, it would be inconsistent with the order for the joint tenancy to survive and be effective so as to render the order abortive. In other words, it appears to me that inherent in the order is involved a severance of the joint tenancy between the parties. I do not accept the argument that the powers of the Family Law Division under Pt. VIII are in all respects limited, as a matter of jurisdiction, to the making of orders which have no operation beyond the joint lives of the parties. In my view the power of the court under section 86(1) is not so limited as a matter of jurisdiction. In addition, it appears to me that in the exercise of that jurisdiction in the present case the Family Law Division has evidenced an intention to divide the property in question between the parties without any limitation as to the length of the life of either of them. It would, of course, be in the highest degree inconvenient if an order such as that made in the present case would fall to the ground upon the death of either party where, as here, it is the division of a capital asset and an order which no doubt furnished some basis for the other orders which were limited to the life of the parties. It appears to me the parties were entitled to order their affairs on the basis it was a final settlement. It would be a matter of chance which of them die first and suffer the results of the order being rendered ineffectual, if the rule of survivorship should be held to continue to apply. Although it would, of course, have been clearer, if there had been an express order that the parties should thenceforth hold the property as tenants in common, I do not think that the absence of these express words should lead me to the opposite conclusion, that they were not

to do so. Rather, I think that the whole thrust and effect of the order is that it was final division of the property between them equally."

In adopting the reasoning of Bowen C.J., we have given consideration to the fact that in *Public Trustee* v. *Grivas*[17], the decree had been made absolute but we are of the view that his Lordship regarded the court's intention when making an order for the division of matrimonial assets as paramount and the finality of such division should not be dependent on the chance of one party dying first and rendering the result of the order ineffectual.

The remaining issue for determination is whether Chua J.'s decision not to vary the terms of the settlement order was correct. In our view, his decision was correct. His Lordship had no power to vary the settlement order as there is no provision in the Women's Charter which empowers a court to vary such an order. When made, it takes effect like any other court order and may only be varied upon appeal. There was no appeal against the settlement order.

Finally, we have not been persuaded that the learned judge has exercised his discretion wrongly in refusing to vary the terms of the settlement order.

For the above reasons, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Jacob Chacko & Associates; James & Co.*

SEK KIM WAH v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Rajah J. & Chan Sek Keong J.C.) July 10, 1987]

[Singapore – Criminal Appeal No. 11 of 1985]

Criminal Law – Murder – Plea of diminished responsibility – Penal Code, s. 300, Exception 7.

The accused was found guilty by the High Court on three charges of murder and convicted accordingly.

The prosecution evidence was that the accused, together with an accomplice, went to a house in Andrew Road to commit robbery. In the process, the accused killed three of the victims.

The accused accepted the prosecution evidence but relied on the defence of diminished responsibility, both at the trial and in the present appeal.

Held, dismissing the appeal: (1) the verdict as to abnormality of mind is plainly a finding of fact which must be founded on all the evidence, including medical opinion. Even where such medical opinion is unchallenged, the trial judges would be perfectly entitled to reject or differ from the opinions of the medical men, if there are other facts on which they could do so;

(2) in the present case, there was overwhelming evidence on which the trial judges were entitled to make the finding which they did. Not only would it be wrong for the appellate court to disturb the finding, this court in any event did not disagree with the trial judges' finding that there was no abnormality of mind.

Per curiam: It would be pertinent ... to add that the facts on which an expert's opinion is based must be proved by admissible evidence, just like any other fact relevant to the case. The expert's role is to explain to the judge the application of the necessary scientific or medical criteria so as to enable the judge to come to his own judgment by the application of these criteria to the facts proved in evidence.

Cases referred to:

(1) *R.* v. *Byrne* (1960) 44 Cr. App. Rep. 246.
(2) *Walton* v. *R.* (1978) 66 Cr. App. Rep. 25.
(3) *R.* v. *Stefan Ivan Kiszko* (1978) 68 Cr. App. Rep. 62.

COURT OF CRIMINAL APPEAL.

Loh Lin Kok for the accused.

Sowaran Singh (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the judgment of the court): The appellant was found guilty by the High Court on three charges of murder and convicted accordingly. He appealed against his conviction.